A

Mohamad Fauzi bin Ridzwan & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P–05–51 OF 2001

B GOPAL SRI RAM, TENGKU BAHARUDIN SHAH AND JAMES FOONG, JJCA

18 OCTOBER 2005

Criminal Law — Dangerous drugs — Trafficking — Procuring — Whether act of introducing drug supplier amounted to procuring — Whether must be connected to act of trafficking — Dangerous Drugs Act 1952 s 39B

C

Criminal Law — Dangerous drugs — Trafficking — Role of introducer — Whether act of procuring was connected to act of trafficking — Whether amounted to trafficking — Dangerous Drugs Act 1952 s 39B

D

Criminal Procedure — Conviction — Validity of conviction — Co-accused — Whether judge could acquit one accused whilst demanding another to enter his defence when the part played by both accused persons in the same offence charged was similar in nature and context

E

Criminal Procedure — Exhibits — Break in chain of evidence — Substance containing dangerous drugs — Whether exhibits were properly accounted for from scene of crime until trial

F

Evidence — Adverse inference — Failure to cross examine witness — Exception — Whether evidence of accused was incredible or romancing character against the weight of the evidence tendered — Whether adverse inference should be raised

G

The first and second appellants were charged — with the first and second accused — and convicted under s 39B of the Dangerous Drugs 1952 ('the DDA'). After the close of the prosecution case, the other two accused were acquitted and discharged without their defences called. The first and second appellants were asked to enter their respective defences and were found guilty and sentenced to death. They appealed against both conviction and sentence.

H

The facts showed that SP3, as an agent provocateur, met the first appellant under the pretext of wanting to purchase ganja. The first appellant brought SP3 to the second appellant. While in a car, SP3 and the second appellant negotiated for the sale and purchase of five kilogram of ganja to be delivered early next morning. At the delivery of the ganja, all the accused were arrested.

I

The first appellant raised two pertinent grounds in this appeal: (1) that the learned trial judge erred in attributing guilt upon the first appellant for his role as an introducer to the actual supplier when another co-accused, Kan, who had played similar role was acquitted and discharged; and (2) that the learned trial judge erred

in finding the first appellant guilty of trafficking in the ganja by 'procuring' when the act of the first appellant did not justify it.

As for the second appellant, it was submitted that: (1) the prosecution had failed to prove beyond reasonable doubt that the exhibits taken from the scene of the crime were those sent to the chemistry department for analysis and subsequently produced before the trial judge; and (2) the failure of the prosecution to cross-examine the second appellant on his defence for not having got out of SP3's car to handle the ganja, nor spoken to the person standing at the scene of the crime implied that he had no knowledge of the trafficking. According to his counsel, failure to cross-examine the second appellant over this crucial piece of testimony would tantamount to an acceptance by the prosecution of the truth of what had been uttered.

Held, allowing the first appellant's appeal and dismissing the second appellant's appeal:

(1) The learned trial judge had erred in acquitting one accused, without his defence called, whilst demanding another to enter his defence when the part played by both these accused persons in the same offence charged was similar in nature and context, viz the role of an introducer. When the learned trial judge found that the part played by Kan, as an introducer, did not fall within the ambit of 'procuring', an act mentioned in the definition of 'trafficking' under s 2 of DDA, then he ought to make similar finding for the first accused and acquit him of the offence charged since the role played by the first accused, as evidence revealed, was almost identical to that of Kan. In terms of proximity to the actual supplier, Kan was closer since it was Kan who introduced SP3 to the second appellant. The learned trial judge cannot make selective finding against one co-accused charged for the same offence under almost identical circumstances guilty and set the other free when both played similar role with no material difference (see para 16).

(2) When 'procuring' is only one of the acts of trafficking and trafficking having its own ordinary meaning then in order for the prosecution to succeed in a charge for trafficking by procuring, the act of procuring must be connected with the act of trafficking so charged. There must be a nexus between the procurer and the person who supplied the drugs to another who accepted delivery of the supply. This was essential since procuring on its own was not an offence on the charge levied against the first appellant; but trafficking was. And for this liaison between procurer and supplier to be of any criminal consequence there must be some kind of agreement or discussion between the procurer and the supplier of the drug as to the type, quality and quantity of the drug to be supplied. These were significant bearing in mind self-consumption being available as a defence to trafficking. Thus if a procurer does not know the quantity or quality of drugs supplied, he cannot be said to be trafficking (see para 23).

(3) The first appellant only acted as an introducer for SP3 to Kan and no further. There was no evidence to prove that the first appellant had knowledge of the amount of ganja to be transacted. Though he was in the car when the

negotiation took place there is no proof that he had full knowledge of the material substance of the deal. Without knowledge of such material particular he could not be said to have discussed and reached an agreement with the supplier to supply the amount of drugs so specified in the charge for trafficking (see para 27).

(4) There was no break in the chain of evidence with regards to the handling of these exhibits from the time they were taken out from SP3's car boot to the time when they were produced by the officer in charge of the police store nor were there any suspicious circumstances to infer that they were tampered with. At each stage of handling, these exhibits were properly accounted for and were secured by those who had charge of them (see para 30).

(5) It is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony on what he has asserted (see para 32). However, like all general rules, there are exceptions. These exceptions, as stated, depend on facts and circumstances of each particular case (see para 36). In this case, it would be wholly unrealistic and illogical for the prosecution to ask the same questions in order to assist the second appellant to deliver a repeated version of his story when, previously, substantial evidence were presented by him to prove directly the opposite of what the second appellant had said on this crucial point viz, it was the second appellant who got out of the car and collected the ganja from the storekeeper and then deposited them in the rear boot of SP3's car. From the nature of the recording presented by the trial judge in this case on the entire testimony of this witness, a challenge had been mounted by the prosecution over this crucial part of the second appellant's evidence (see para 40). Further the second appellant's version relating to this crucial part of the second appellant's evidence was of an incredible or romancing character against the weight of the evidence tendered. For this, the exception to the general rule that failure to cross-examine a witness on a crucial part of the case would amount to an acceptance of that portion of his evidence applied in this case (see para 41).

[Bahasa Malaysia summary

Perayu pertama dan kedua didakwa — bersama dengan tertuduh pertama dan kedua — dan disabitkan di bawah s 39B Akta Dadah Berbahaya 1952 ('ADB'). Selepas penutupan kes pihak pendakwa, dua tertuduh lagi telah dibebaskan dan dilepaskan tanpa pembelaannya dipanggil. Perayu pertama dan kedua telah diminta untuk memasukkan pembelaan masing-masing dan telah didapati bersalah dan dihukum mati. Mereka merayu terhadap kedua-dua sabitan dan hukuman.

Fakta menunjukkan bahawa SP3, sebagai 'agent provocateur' telah bertemu dengan perayu pertama kononnya untuk membeli ganja. Perayu pertama telah membawa SP3 kepada perayu kedua. Semasa berada di dalam kereta, SP3 dan perayu kedua membuat rundingan untuk jual beli 5 kilogram ganja yang akan dihantar keesokan paginya. Semasa penghantaran ganja tersebut, kesemua tertuduh telah ditahan.

Perayu pertama telah membangkitkan dua alasan yang berkaitan dalam rayuan ini: (1) bahawa yang arif hakim bicara telah silap kerana meletakkan kesalahan ke atas perayu pertama yang bertindak sebagai orang yang memperkenalkan kepada

pembekal sebenar sementara seorang lagi tertuduh bersama, Kan, yang juga memainkan peranan yang sama, telah dibebaskan dan dilepaskan; dan (2) bahawa yang arif hakim bicara telah silap dalam mendapati bahawa perayu pertama bersalah kerana mengedar ganja dengan 'memperoleh' apabila tindakan perayu pertama tidak memberi justifikasi kepadanya.

Berkenaan dengan perayu kedua, ianya dihujahkan bahawa: (1) pihak pendakwa telah gagal untuk membuktikan di luar keraguan yang munasabah bahawa eksibit-eksibit yang diambil daripada tempat kejadian jenayah adalah eksibit yang sama yang dihantar ke jabatan kimia untuk dianalisa dan seterusnya dikemukakan di hadapan hakim bicara; dan (2) kegagalan pihak pendakwa untuk memeriksa-balas perayu kedua berkenaan pembelaannya kerana tidak keluar daripada kereta SP3 untuk mengendalikan ganja, dan juga tidak bercakap dengan orang yang berdiri di tempat kejadian jenayah menandakan bahawa dia tidak mempunyai pengetahuan berkenaan dengan pengedaran tersebut. Menurut peguamcaranya, kegagalan untuk memeriksa-balas perayu kedua berkenaan dengan testimoni yang penting itu adalah merupakan satu penerimaan oleh pihak pendakwa akan kebenaran mengenai apa yang telah dikatakan.]

Diputuskan, membenarkan rayuan perayu pertama dan menolak rayuan perayu kedua:

(1) Yang arif hakim bicara telah silap dalam melepaskan seorang tertuduh, tanpa dipanggil untuk pembelaan, sementara mengarahkan seorang lagi tertuduh untuk memasukkan pembelaannya apabila peranan yang dimainkan oleh kedua-dua tertuduh dalam pertuduhan yang sama adalah serupa dari segi sifat dan konteksnya, iaitu sebagai seorang 'introducer'. Apabila hakim bicara mendapati bahawa peranan yang dimainkan oleh Kan, sebagai seorang 'introducer' tidak termasuk dalam lingkungan 'memperoleh', satu tindakan yang disebut dalam takrif 'mengedar' dalam s 2 ADM, maka beliau sepatutnya membuat penemuan yang serupa bagi tertuduh pertama dan melepaskannya daripada kesalahan yang didakwa memandangkan peranan yang dimainkan oleh tertuduh pertama, seperti yang didedahkan oleh keterangan, adalah hampir sama dengan peranan Kan. Dari segi kedekatan (proximity) dengan pembekal sebenar, Kan lebih rapat memandangkan Kan adalah orang yang memperkenalkan SP3 kepada perayu kedua. Yang arif hakim bicara tidak boleh membuat penemuan selektif terhadap seorang tertuduh bersama yang didakwa dengan kesalahan yang sama di dalam keadaan yang hampir sama sebagai bersalah dan membebaskan seorang lagi apabila kedua-duanya telah memainkan peranan yang sama tanpa sebarang perbezaan yang material (lihat perenggan 16).

(2) Apabila 'memperoleh' hanyalah salah satu daripada kelakuan mengedar dan mengedar mempunyai maksudnya yang tersendiri, maka untuk pihak pendakwa berjaya dalam dakwaan mengedar melalui memperoleh, kelakuan memperoleh itu perlu berkaitan dengan kelakuan mengedar tersebut. Perlu ada kaitan di antara orang yang memperoleh dan orang yang membekalkan dadah kepada orang yang menerimanya untuk penghantaran bekalan. Ini adalah penting kerana memperoleh semata-mata bukanlah kesalahan bagi dakwaan

yang dikenakan terhadap perayu pertama. Kesalahannya adalah mengedar. Dan untuk menjadikan hubungan di antara pemeroleh dan pembekal sebagai satu jenayah, perlu terdapat persetujuan atau perbincangan di antara pemeroleh dan pembekal dadah berkenaan dengan jenis, kualiti dan kuantiti dadah yang akan dibekalkan. Ini adalah penting memandangkan penggunaan untuk diri sendiri adalah satu pembelaan dalam dakwaan mengedar. Oleh itu, jika pemeroleh tidak mengetahui kuantiti atau kualiti dadah yang dibekalkan, dia tidak boleh dikatakan sebagai mengedar (lihat perenggan 23).

(3) Perayu pertama hanya bertindak sebagai orang yang memperkenalkan SP3 kepada Kan, dan tidak lebih dari itu. Tiada bukti yang menunjukkan bahawa perayu pertama mempunyai pengetahuan berkenaan dengan jumlah ganja yang dijual. Walaupun dia berada dalam kereta semasa berlakunya urusan jual beli, tiada bukti bahawa dia mempunyai pengetahuan penuh berkenaan dengan bahan material urusan tersebut. Tanpa pengetahuan berkenaan butir-butir material, dia tidak boleh dikatakan sebagai telah berbincang dan mencapai persetujuan dengan pengedar untuk mengedar jumlah dadah seperti yang dinyatakan dalam dakwaan mengedar (lihat perenggan 27).

(4) Tiada sebarang lompang dalam rangkaian keterangan berkenaan dengan pengendalian eksibit daripada masa ia dikeluarkan daripada boot kereta sehingga masa ia dikemukakan oleh pegawai yang bertugas di stor polis, dan tiada juga sebarang keadaan yang meragukan bagi mengatakan bahawa ia telah diusik. Dalam setiap tahap pengendalian, eksibit-eksibit ini dijelaskan dan disimpan oleh mereka yang bertugas (lihat perenggan 30).

(5) Adalah menjadi peraturan umum bahawa kegagalan untuk memeriksa-balas seseorang saksi pada bahagian penting sesuatu kes akan dikira sebagai penerimaan testimoni saksi tersebut (lihat perenggan 32). Walau bagaimana pun, seperti semua peraturan umum yang lain, terdapat pengecualian kepadanya. Pengecualian-pengecualian ini, seperti yang telah dinyatakan, bergantung pada fakta dan keadaan setiap kes (lihat perenggan 36). Dalam kes ini, amat tidak realistik dan tidak logik bagi pihak pendakwa untuk bertanyakan untuk menolong perayu kedua untuk mengemukakan cerita versi ulangannya, sedangkan, sebelum itu, bukti yang teguh telah dikemukakan untuk menyangkal apa yang telah dikatakan oleh perayu kedua berkenaan perkara yang penting tersebut, iaitu, perayu kedua adalah orang yang keluar daripada kereta dan mengambil ganja daripada penjaga kedai dan memasukkannya ke dalam boot kereta SP3. Daripada sifat rakaman yang telah dikemukakan oleh hakim bicara dalam kes ini berkenaan dengan keseluruhan testimoni saksi ini, satu cabaran telah dibangkitkan oleh pihak pendakwa berkenaan bahagian penting keterangan perayu kedua ini (lihat perenggan 40). Tambahan pula, versi perayu kedua berkenaan dengan bahagian penting keterangan perayu kedua adalah bersifat luar biasa bercanggah dengan keterangan yang dikemukakan. Bagi perkara ini, pengecualian terhadap peraturan umum bahawa kegagalan untuk memeriksa-balas seseorang saksi berkenaan bahagian penting kes tersebut adalah dikira sebagai penerimaan keterangan tersebut terpakai dalam kes ini (lihat perenggan 41).

Notes

For cases on drug trafficking, see 4*Mallal's Digest*, (4th Ed, 2003 Reissue) paras 112–120.
For cases on validity of conviction, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1521–1526.
For cases on break in chain of evidence, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1705–1706.
For cases on adverse inference generally, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 114–212.

Cases referred to

Attorney-General's Reference (No 1 of 1975) (1975) 2 All ER 684 (refd)
Ayoromi Helen v PP [2005] 1 MLJ 699 (refd)
Chow Kok Keong v PP [1989] 2 AMR 1401 (refd)
Chow Kok Keong v PP [1998] 2 MLJ 337 (refd)
Cohen Lorraine Philis & Anor v PP [1989] 3 MLJ 289 (refd)
Ng Chai Kem v PP [1994] 2 MLJ 210 (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401 (refd)
PP v Nik Ahmad Aman bin Nik Mansor [2002] 2 MLJ 641 (refd)
Syed Ali bin Syed Abdul Hamid & Anor v PP [1982] 1 MLJ 132 (refd)
Teh Geok Hock v PP [1989] 3 MLJ 162 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212 (refd)

Legislation referred to

Criminal Procedural Code s 268
Dangerous Drug Act s 2

R Palaniappan (Palani) for the first appellant.
RSN Rayer (R Nethaji Rayer & Co) for the second appellant.
Meor Hashmi Abdul Hamid (Attorney General's Chambers) for the respondent.

James Foong (delivering judgment of the court):

INTRODUCTION

[1] In this appeal before us, the first and second appellants, who were the third and second accused, were charged together with two others in the High Court as follows:

> Bahawa kamu bersama-sama pada 17 April 1998 jam lebih kurang 11.00 malam di hadapan Stesyen Minyak Shell, Jalan Masjid Negeri, dalam Negeri Pulau Pinang, didapati ada mengedar Dadah Berbahaya iaitu Ganja seberat 4,760 gram dan telah melakukan kesalahan yang boleh dihukum di bawah s 39B Akta Dadah Berbahaya 1952.

[2] After the close of the prosecution case, the other two accused (first and fourth accused) were acquitted and discharged without their defences called. The first and second appellants were asked to enter their respective defences. Thereafter they were found guilty as charged and sentenced to death. They now appeal to this court against both conviction and sentence.

[3] After hearing submissions from their respective counsel, we unanimously agreed to: (a) allow the first appellant's appeal, quash his conviction and set aside the sentence of death; (b) dismiss the second appellant's appeal, affirm his conviction and death sentence.

BACKGROUND

[4] The background of this case is as follows: Instructed by his superior, detective sergeant Busra Abdul Kadir (SP3), as an agent provocateur, met the first appellant in Grik, Perak on 31 March 1998. Under the pretext of wanting to purchase ganja, SP3 discussed with first appellant for the supply. According to SP3, the first appellant informed him that he only distributed ganja in small packets of RM10.00 each and that his supplies came from Penang. SP3 went further to say that the first appellant informed him that if SP3 wanted supplies, he could recommend his friend from Penang to SP3. This meeting ended with both exchanging telephone numbers.

[5] On 10 April 1998, SP3 said that he received a call from the first appellant to meet in Penang the next day. Instructed by his superior to delay this meeting for a few days, SP3 replied to say that his car broke down and would not be able to be in Penang so soon. Then on 15 April 1998, SP3 said that the first appellant telephoned him again. This time, the first appellant requested to meet up the next day at Kebun Bunga in Penang.

[6] On 16 April 1998, the SP3 together with a team of police officers from Ipoh left for Penang. As arranged, SP3 on his own proceeded to meet the first appellant at the predetermined place. He was introduced to one Pak Long by first appellant. But the person whom they should meet was in fact Pak Long's nephew — Kan who did not show up. Since Kan was not present, SP3 said that he departed. But around 9 pm on the same day first appellant contacted him by phone to meet at Pak Long's residence. This time, SP3 said that he went but on instruction from his superior brought along Detective Corporal Zainal, who went under the cover name of 'Zul' for this operation.

[7] In Pak Long's house, SP3 and Zul met Kan (the fourth accused). Together with first appellant, Kan and Zul, SP3 drove his car to a burger store at Jalan Perak, Penang under the direction of Kan. There, Kan met up with a man called Kudin (the second appellant). SP3 claimed that the second appellant got into his car and together with first appellant, Zul, Kan and himself drove to Bayan Lepas. While in the car, SP3 and second appellant negotiated for the sale and purchase of five kilogram of ganja at RM1150 per kilogram to be delivered early next morning at a Muslim cemetery in front of the mosque at Kampong Dodol. Throughout this ride in SP3's car, neither the first appellant nor Kan participated in the negotiation between the second appellant and SP3. Again before they parted for the evening, telephone contact numbers were exchanged between the second appellant and SP3. Aside from this, SP3 asserted that both the first appellant and Kan requested to be picked up by SP3 for the actual delivery of the ganja set for the next morning. After this meeting, SP3 and Zul returned to the Rest House to brief their superior of what had transpired.

[8] At 5 am on 17 April 1998, SP3 received a telephone call from the second appellant informing him that the storekeeper for the ganja has yet to be located and promised to contact later. At 6.15 am another call came from the second appellant to SP3 to say that the said storekeeper for the said ganja was still not contactable. By 8.30 am, the police party who came for this operation decided to return to Ipoh. On the way to Ipoh, SP3 received a telephone call from the second appellant requesting him to return to Penang so that they could meet. On the instruction of his superior, SP3 arranged to meet in the evening between 9 to 10 pm.

[9] The police party then returned to Penang and at about 9 pm, SP3 telephoned the second appellant to inform that he was about to arrive in Penang. At 10.30 pm, the second appellant telephoned SP3 and instructed SP3 to meet him at the same pre-determined place in Kampong Dodol. Upon this information, SP3's superior made necessary arrangement to lay an ambush.

[10] SP3 told the court that at about 10.30 pm, he and Zul drove to the Muslim cemetery in Kampong Dodol. There he met the second appellant who got into the rear passenger seat of his car. Following the directions of the second appellant, SP3 drove into a lane at a fourth junction near to the place where they met. There were some houses and close to some nearby trees, SP3 stopped his car. He was requested by the second appellant to open the rear boot of the car, which he complied. After that, all three of them got out of the car. Standing near the trees was a male whom the second appellant approached and spoke to before being handed by this person five lumpy compact packets, wrapped in tin foils. After receiving this, the second appellant deposited them in the rear boot of SP3's car. The second appellant, SP3 and Zul then got into the car and drove off. In the car, SP3 claimed that the second appellant demanded payment for the ganja. While Zul was taking his time to count the money for the second appellant, SP3 drove into a Shell service station that was predetermined with SP3's superior. There the second appellant was arrested.

[11] The five packets of suspected drugs were later sent to the chemistry department and upon analysis found to be ganja, a dangerous drugs prescribed under the first schedule of the Dangerous Drugs Act 1952 ('DDA'), weighing 4760 grams.

[12] The male person who handed these packets of drugs to the second appellant was later arrested and charged together with first and second appellants and Kan. He was the first accused.

FIRST APPELLANT'S APPEAL

[13] The first appellant has raised two pertinent grounds in this appeal: (1) that the learned trial judge has erred in attributing guilt upon the first appellant for his role as an introducer to the actual supplier when another co-accused, Kan, who had played similar role was acquitted and discharged; (2) that the learned trial judge has erred in finding the first appellant guilty of trafficking in the ganja by 'procuring' when the act of the first appellant does not justify it.

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First ground

[14] In respect of the first ground, it is relevant to set out the learned trial judge's reasons for acquitting Kan without calling for his defence. According to the learned trial judge, Kan, a nephew of Pak Long was only involved in bringing SP3 and Zul to meet the second appellant. Though Kan knew that the second appellant agreed to supply the ganja to SP3 and, will take delivery of the same the next day at the Muslim cemetery and, had in fact requested to be physically present during the actual delivery the next morning the learned judge announced:

> Pada pertimbangan saya dalam keadaan sedemikian Kan bukanlah orang yang berusaha mendapatkan ganja itu dengan sekadar memperkenalkan Isa (SP3) kepada Kudin (second appellant). Kan tidak memainkan peranan yang menghasilkan jualan ganja itu kepada Isa, tidak seperti Ji (first appellant) yang berusaha sungguh untuk mendapatkan ganja itu. Kan tidak terjumlah dalam definasi 'pengedaran dadah' di bawah s 2 Akta.

[15] With this, the first appellant's counsel argued before us that the learned trial judge should apply this same reasoning and acquit the first appellant since the role played by the first appellant is very similar to that of Kan. The first appellant was only an introducer and was not involved with the actual delivery of the ganja by the second appellant to SP3 and Zul.

[16] We agree entirely with this submission of the first appellant's counsel. The learned trial judge, in our opinion, has erred in acquitting one accused, without his defence called, whilst demanding another to enter his defence when the part played by both these accused persons in the same offence charged is similar in nature and context viz the role of an introducer. When the learned trial judge found that the part played by Kan, as an introducer, does not fall within the ambit of 'procuring', an act mentioned in the definition of 'trafficking' under s 2 of DDA, then he ought to make similar finding for the first accused and acquit him of the offence charged since the role played by the first accused, as evidence revealed, is almost identical to that of Kan. The only minor variation is that the first appellant was the first person whom SP3 met for the supply of ganja and Kan came into the picture subsequently. But then, in terms of proximity to the actual supplier, Kan is closer since it was Kan who introduced SP3 to the second appellant. The first appellant did not even know the second appellant until being introduced by Kan at the same time as SP3. The learned trial judge cannot make selective finding against one co-accused charged for the same offence under almost identical circumstances guilty and set the other free when both played similar role with no material difference. For this reason, we find that the learned trail judge has misdirected himself and on this ground alone, it is sufficient to warrant us to allow this appeal of the first appellant.

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Second ground

[17] For completeness we shall move on to deal with the second ground raised by the first appellant. His counsel pointed out that the learned trial judge found the first appellant guilty of trafficking by the act of procuring, which is one of the acts of trafficking within the definition of s 2 of the DDA, based on the fact that the first

appellant brought SP3 and Zul to Kan who then in turn introduced them to the second appellant, the purported supplier of the ganja. But procuring, according to the first appellant's counsel, requires the prosecution to prove that the first appellant was actually trafficking in the ganja and had the intention to do so. This, according to learned counsel, the prosecution has failed to do.

[18] 'Trafficking' under s 2 of the DDA:

> includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drugs.

[19] But in a series of judicial pronouncements (see the case of *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401; *Teh Geok Hock v Public Prosecutor* [1989] 3 MLJ 162; *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337; *Syed Ali bin Syed Abdul Hamid & Anor v Public Prosecutor* [1982] 1 MLJ 132) it is accepted that s 2 DDA does not define the word 'trafficking'. It only sets out a number of acts to what that word encompasses. Thus in *Teh Geok Hock v Public Prosecutor*, Hashim Yeop Sani CJ (Malaya) in the Supreme Court declared:

> True, the definition in the Act sounds artificial and not according to the ordinary meaning of the word 'trafficking' which is normally understood to mean to trade in, buy or sell, any commodity, albeit often with sinister implication. See also the *Shorter Oxford English Dictionary*. The definition of 'trafficking' in the Act is wide and includes not only buying and selling, but also carrying, concealing and keeping. It is totally different from the definition of the word 'traffic' in the Singapore Misuse of Drugs Act. In the Singapore provision to 'traffic' in a controlled drug so as to constitute an offence of trafficking involves something more than passive possession or self-administration of the drug. See *Ong Ah Chuan v Public Prosecutor*.

[20] This view is somewhat watered down by the later Supreme Court case of *Cohen Lorraine Philis & Anor v Public Prosecutor* [1989] 3 MLJ 289; *Ng Chai Kem v PP* [1994] 2 MLJ 210; and C*how Kok Keong v PP* [1989] 2 AMR 1401, where a defence of self-consumption might be available even where the quality of drugs involved exceeds the limit that triggers a presumption of trafficking.

[21] After examining the series of cases touching on the word 'trafficking', Augustine Paul J (as he then was) in *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* concluded that the courts have held that the word 'trafficking' should retain its ordinary meaning despite being given its extended meaning under s 2 DDA; and by definition stated in *Black's Law Dictionary* (6th Ed) 'trafficking' is – 'Trading or dealing in certain goods and commonly used in connection with illegal narcotic sales'. Thus, according to this learned judge "to traffic' imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied'.

[22] This view was somewhat shared by Kang Hwee Gee J in *Public Prosecutor v Nik Ahmad Aman bin Nik Mansor* [2002] 2 MLJ 641 when he said at p 652:

> ... But by deciding that self-consumption can constitute a good defence to a charge of trafficking, at the very least, one can now be sure that the act of trafficking cannot be equated directly with the acts of transporting, carrying, sending, delivering, procuring, supplying or distributing the drug.
>
> I am persuaded by the reasoning in *Ong Ah Chuan v Public Prosecutor* that to prove the accused was trafficking in the context of the instant case it would still be necessary to prove that he transferred or at least intended to transfer possession (or at least custody and control) of the drug to another party. Had it been the intention of the legislature to make the mere acts of transporting, carrying, sending, delivering, procuring, supplying or distributing the drug an offence punishable by death, it would have said so directly in clear language avoiding altogether the word 'trafficking'.

[23] After giving due consideration to the propositions above, we come to the conclusion that when 'procuring' is only one of the acts of trafficking and trafficking having its own ordinary meaning then in order for the prosecution to succeed in a charge for trafficking by procuring, the act of procuring must be connected with the act of trafficking so charged. There must be a nexus between the procurer and the person who supplied the drugs to another who accepted delivery of the supply. This is essential since procuring on its own is not an offence on the charge levied against the first appellant; but trafficking is. And for this liaison between procurer and supplier to be of any criminal consequence there must be some kind of agreement or discussion between the procurer and the supplier of the drug as to the type, quality and quantity of the drug to be supplied. These are significant bearing in mind self-consumption being available as a defence to trafficking (even though the quantity of drugs involved exceeds the limit that triggers the presumption of trafficking) as decided in *Cohen Lorraine Philis & Anor v Public Prosecutor* [1989] 3 MLJ 289; *Ng Chai Kem v Public Prosecutor* [1994] 2 MLJ 210; and *Chow Kok Keong v Public Prosecutor* [1989] 2 AMR 1401. Thus if a procurer does not know the quantity or quality of drugs supplied, he cannot be said to be trafficking. Without such knowledge he cannot be said to have intention to traffic in the drug so charged. Thus, it is essential that in order to succeed in a charge for trafficking by procuring to prove the existence of an agreement or discussion between the procurer and the supplier where the type, quality and quantity of the drug to be supplied are ascertained and agreed upon by both such parties before a procurer can be said to be guilty of trafficking in the drug which he is charged.

[24] The prosecution has referred us to a dictum of the Court of Appeal, Criminal Division of England in *Attorney-General's Reference (No 1 of 1975)* [1975] 2 All ER 684, which declares:

> To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take. In our judgment the offence described in this reference is such a case.

[25] But we wish to point out that the nature of the offence in *Attorney-General's Reference (No 1 of 1975)* is very different from our instant case. In *Attorney-General's Reference (No 1 of 1975)*, the Court of Appeal, Criminal Division of England was asked:

> Whether an accused person who surreptitiously laced a friend's drinks with double measures of spirits when he knew that his friend would shortly be driving his car home, and in consequence his friend drove with an excess quantity of alcohol in his body and was convicted of the offence under the Road Traffic Act 1972 s 6(1) is entitled to a ruling of no case to answer on being later charged as an aider and abetter, counsellor and procurer, on the ground that there is no shared intention between the two, that the accused did not by accompanying him or otherwise positively encourage the friend to drive, or on any other ground.

[26] As one can observe by this disclosure, procuring in *Attorney-General's Reference (No 1 of 1975)* may be an offence standing on its own but in our instant case, procuring is one of the acts of trafficking under s 2 DDA, and as elaborated earlier, procuring must be connected with the offence of trafficking. The first appellant is not charged for procuring under the DDA; he is charged for trafficking and this requires an agreement between the procurer and the supplier of the type, quantity and quality of the drug to be supplied. For this, we are of the view that the proposition cited in this case is not applicable to the facts in our case at hand.

[27] As declared by the learned trial judge, the first appellant only acted as an introducer for SP3 to Kan and no further. There is no evidence to prove that the first appellant had knowledge of the amount of ganja to be transacted. Though he was in the car when the negotiation took place there is no proof that he had full knowledge of the material substance of the deal. Without knowledge of such material particular he could not be said to have discussed and reached an agreement with the supplier to supply the amount of drugs so specified in the charge for trafficking. On the evidence, he did not even know or at any time have any interaction with the first accused or the purported supplier. With this, we find that the learned trial judge has erred in concluding that the prosecution has made out a prima facie case against the first appellant for trafficking in the said ganja as charged. For this reason as well, we allowed this appeal of the first appellant.

SECOND APPELLANT'S APPEAL

First ground

[28] The first ground raised by the second appellant in this appeal is that the prosecution has failed to prove beyond reasonable doubt that the exhibits taken from the scene of the crime were those sent to the chemistry department for analysis and subsequently produced before the trial judge.

[29] Against this assertion, we first examined the finding of the learned trial judge on this issue and then cross checked this against the recorded evidence. Over this matter, the learned trial judge has, in his written judgment, under a sub-heading: 'Rantai pergerakan eksibit' detailed the movement of the 5 packets of ganja

commencing from the time when they were taken by DSP Yusuh (SP6) who marked them as 'Y1 to Y5' respectively, then handed over to ASP Teoh (SP13), the Investigating Officer, who in turn put them in a box which he marked 'E' before presenting it to the chemist (SP2) for analysis. When these exhibits were with SP2, they were under her surveillance and after the analysis by her, they were returned to SP13. From there SP13 forwarded them to the police store for safe keeping. There they remained until produced in the High Court at the time of trial.

[30] We have checked this finding of the learned trial judge against the evidence recorded and found them to be supportive of the conclusion arrived at. There is no break in the chain of evidence with regards to the handling of these exhibits from the time they were taken out from SP3's car boot to the time when they were produced by the officer in charge of the police store nor was there any suspicious circumstances to infer that they were tampered with. At each stage of handling, these exhibits were properly accounted for and were secured by those who had charge of them. With these, we are of the opinion that there is no merit to this ground of complaint by the second appellant.

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Second ground

[31] The second ground raised by the second appellant in this appeal concerns the failure of the prosecution to cross-examine the second appellant on his defence for not having got out of SP3's car to handle the ganja, nor spoken to the person standing near the trees at the scene of the crime thereby implying that he has no knowledge of the trafficking. According to his counsel, failure to cross-examine the second appellant over this crucial piece of testimony would tantamount to an acceptance by the prosecution of the truth of what has been uttered. With this, the learned trial judge has misdirected himself when arriving at the conclusion of guilt for the second appellant for, if he did, he should have come to a favourable finding for the second appellant.

[32] We accept that it is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony on what he has asserted. This can be derived from *Wong Swee Chin v PP* [1981] 1 MLJ 212 where Raja Azlan Shah CJ (Malaya) (as His Highness then was) declared:

> A correct statement of the law is that failure of the defence to cross-examine the prosecution witnesses on the matter merely goes to the creditability of their testimony... On this point we need only say there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony. But as it is common with all general rules, there are also exceptions as pointed out in the judgment of the Supreme Court of New Zealand in *Transport Ministry v Garry* where Haslam J said at p 122:
>
> > In *Phipson on Evidence* (11th Ed) paragraph 1544 the learned authors suggest examples by way of exception to the general principle that failure to cross-examine will amount to an acceptance of the witness' testimony, viz, where '... the story is itself of an incredible or romancing character, or the abstention arises from mere motive of delicacy... or when counsel indicates that he is merely abstaining for convenience, eg, to save time. And where several witnesses are called on the same point, it is not always necessary to cross examine them all.'

[33] This rule applies with equal force to witnesses called by the defense. This can been seen from the decision of this court in *Ayoromi Helen v Public Prosecutor* [2005] 1 MLJ 699 where at p 706, Augustine Paul JCA (as he then was) speaking for the court said:

> This rule would apply with equal force to witnesses called by the defense as well. This is particularly so as there is a duty on the prosecution to negate defences that have been raised and the burden of proof is on the prosecution to prove its case beyond reasonable doubt till the end of the case. This would therefore require cross-examination of evidence given by the defense witnesses by the prosecution in order to discharge the burden it carries.

[34] Further elaboration of this principle can be secured from two other cases. In *Public Prosecutor v Leong Heo Cheong* [1990] 2 CLJ 818 where Edgar Joseph Jr J (as he then was) noted at p 820:

> It is settled law that if on a crucial part of the case, the prosecution intends to ask the court to disbelieve the evidence of a witness called for the defence, counsel for the prosecution ought to cross-examine that witness, or at any rate, to make it plain, while the witness is in the box, that his evidence is not to be accepted (see *R v Hart 23 CAR 202*). I see no reason why the same principle should not apply — indeed apply even more strongly — to an accused person who testifies on his own behalf.

[35] In *Noor Azahar bin Habin v Rajaswah a/p Sithampara Filial & Anor* [1991] 1 CLJ 151, Richard Talalla JC (as he then was) at p 153 after reiterating the principle on this point expounded in the case of *Wong Swee Chin v Public Prosecutor* added:

> It is significant that his Lordship described the rule as being general. That in my view is taken to mean that the facts and circumstances of a particular case need to be examined to ascertain whether the rule applies and if so to what extent.

[36] We accept that the propositions disclosed above are the general state of the law on this subject but as cautioned, like all general rules, there are exceptions. These exceptions, as stated, depend on facts and circumstances of each particular case and in *Phipson on Evidence* latest edition (15th Ed) it is opined:

> Failure to cross-examine will not, however, always amount to acceptance of the witness's testimony, for example if the witness has had notice to the contrary beforehand, or the story itself is of an incredible or romancing character or the abstention arises from motives of delicacy in the cross-examination of children, or to save time by not putting the same matter to several witnesses. It is open to counsel, and usually safer, to seek the judge's leave not to cross-examine. Similarly, counsel for one of two co-defendants may adopt the cross-examination of counsel for the other.

[37] To evaluate this contention of the second appellant on the failure of the prosecution to cross-examine on this crucial piece of evidence, we must first determine whether there was indeed such failure on the part of the prosecution. To do so we first reverted to the testimony of the second appellant given in examination-in-chief.

[38] The second appellant explained that on 16 April 1998 at about 9.30pm, while waiting for his wife along the main road, a car came by. There were five people in the car: SP3, Zul, first appellant, Kan and Pak Long (whom he knew for about a month). He was invited to join this party in the car. This he did. They drove to Bayan Lepas and smoked ganja in the car. While in the car, the second appellant did not join in the conversation that was conducted between SP3 and Pak Long, When he was departing from the car ride, Pak Long requested him to wait in front of the Masjid at 9 pm the next day to take two persons to Kampong Dalca. According to the second appellant, Pak Long did not inform him of the objective. Then on 17 April 1998, as instructed he waited for the two persons in front of the Masjid and when SP3 and Zul turned up he took them to a lane in Kampong Dalca. The second appellant then insisted that:

> Pada esok malam 17 haribulan lepas Isyak saya tunggu mereka. Mereka berdua datang ke Masjid. Saya bawa mereka pergi ke Kg Dalca, di satu lorong di sana ada rumah kampong. Saya tak turun kereta dan tak tahu ada seorang menunggu berhampiran rumah... Mereka keluar dari kereta dan saya tak tahu apa mereka buat. Saya kurang perhatikan orang berhampiran rumah itu. Lepas itu mereka hantar saya pulang ke Jalan Perak.

[39] We then perused what was recorded in cross-examination. Except for one answer which was recorded in verbatim, the notes of evidence taken by the learned trial judge during cross-examination of the second appellant are in narrative form. They repeated virtually what was asserted during examination-in-chief of this witness except with elaborations. We reproduced a section of what is recorded that is considered the crucial part with emphasis:

> Saya tak tanya Pak Long apa sebab bawa mereka ke sana. Saya dan Pak Long tak berhubung selepas arahannya. Saya tak biasa dengan Kg Dalca. Kami tak berbual dalam perjalanan ke Kg Dalca kecuali menyuruh ikut jalan. Pak Long beritahu saya supaya masuk Lorong kedua menuju ke Kg Dalca. Kereta saya berhenti di rumah pertama (witness demonstrates). Kereta buat U-turn. Saya duduk di belakang. Saya nampak bayangan seorang di tepi rimbun pokok di tepi rumah. Isa (SP3) dan Zul turun dan berjumpa orang itu. Saya tak tahu apa mereka cakap. Saya nampak mereka kerana ada cahaya lampu. Jarak saya 20 kaki dari orang itu. Saya duduk saja dalam kereta, 10-15 minit. Engin kereta tak mati. Mereka naik kereta dan hantar saya balik.

[40] Under s 268 of the Criminal Procedural Code, evidence recorded need not be taken down in the form of question and answer, a narration is sufficient. Therefore it is up to the trial judge to exercise his preference: either to record it in the format of question and answer or in a narrative manner. The choice is his. When the notes of evidence, as in this case, are in a narrative nature then a reader of the notes would have to deduct from the contents recorded the nature and structure of the questions posed to the witness that drew the character of the recorded narration. In the instant case, with the second appellant's version of the events, particularly the crucial portion, already disclosed in examination-in-chief but was once repeated with elaboration in cross-examination then we can only deduced that the questions asked by the learned deputy at the material time during cross-examination were of the nature and form of challenges against the version given by the second appellant in his evidence-in-chief. As the learned deputy is not counsel for the second appellant but representing the prosecution, it would be wholly unrealistic and illogical to ask the

same questions in order to assist the second appellant to deliver a repeated version of his story when, previously, substantial evidence were presented by him to prove directly the opposite of what the second appellant has said on this crucial point viz, it was the second appellant who got out of the car and collected the ganja from the storekeeper and then deposited them in the rear boot of SP3's car. From the nature of the recording presented by the leaned trial judge in this case on the entire testimony of this witness we are convinced that a challenge has been mounted by the prosecution over this crucial part of the second appellant's evidence.

[41] Further it is our view that the second appellant's version relating to this crucial part of the second appellant's evidence is of an incredible or romancing character against the weight of the evidence tendered. The second appellant has denied that he got out of the car at the material time but yet it was he who led SP3 and Zul to the location. And as to why he had to go there was responded by his assertion that Pak Long instructed him to do so without giving any reason or objective. This is highly incredible in the light of the events that transpired on the night of the 16th when the second appellant suddenly discarding his wife (whom he was supposed to be waiting for by the main road), got into SP3's car and remained there throughout without hearing the alleged conversation that transpired between SP3 and Pak Long and, then, without any reason, followed Pak Long's instruction to take two men, whom the second appellant did not even know earlier were SP3 and Zul, the next day to a destination described by Pak Long. And finally at the destination did not even get out of the car for a good 10 to 15 minutes. All these we find are too incredible and romantic in the light of the evidence advanced in this case. For this, the exception to the general rule that failure to cross-examine a witness on a crucial part of the case would amount to an acceptance of that portion of his evidence applies in this case.

[42] With this, the second ground of appeal of the second appellant cannot be sustained.

Third ground

[43] The final ground raised by the second appellant in this appeal is that the learned trial judge failed to express in his judgment that the prosecution had: (a) proved a prima facie case beyond all reasonable doubt at the end of the prosecution case before calling the second appellant to enter his defence; and (b) proved its case beyond all reasonable doubt (after the defence) before convicting and sentencing the second appellant.

[44] We must remind that the judge's findings are not only derived from his written judgment itself but also from the notes of evidence recorded by him on the case. From these, we find no truth in the first allegation. At p 7 (p 171 of the appeal record) the learned trial judge had given an extensive and in depth analysis of all the evidence tendered by the prosecution and arrived at the finding that the prosecution has proved a prima facie case against the second appellant before calling upon him to render his defence.

[45] Similarly, there is also no truth in the second allegation. At p 13 (p 177 of the appeal record), the learned trial judge states:

Pembelaan Kudin (second appellant) tidak menimbulkan sebarang keraguan yang munasabah terhadap kes pendakwaan. Saya dapati pendakwaan telah membuktikan kesnya terhadap Kudin melampaui keraguan yang munasabah.

CONCLUSION

[46] For reasons stated we allowed: (a) the first appellant's appeal and quashed his conviction and sentence; (b) dismissed the second appellant's appeal and affirmed his conviction and sentence.

First appellant's appeal allowed. Second appellant's appeal dismissed.

Reported by Loo Lai Mee